TOMMY L. ALFORD

IBLA 82-998 Decided February 16, 1983

Appeal from decision of the Wyoming State Office, Bureau of Land Management, dismissing protest against validity of first-drawn application for oil and gas lease. W 78293.

Affirmed.

1. Administrative Authority: Generally -- Administrative Procedure: Adjudication -- Rules of Practice: Generally
A decision becomes final when the appeal period has run and the Bureau of Land Management may reconsider and amend a decision pursuant to a petition for reconsideration filed during the appeal period.

2. Oil and Gas Leases: Applications: Attorneys-in-Fact or Agents

The regulation at 43 CFR 3102.2-6 (1981) requires that an oil and gas lease applicant assisted by a filing service agent provide a copy of the agreement authorizing the agent to perform services on behalf of the applicant. Where the filing service agent is a corporation, proof of the authority of the employee executing the application to act for the filing service is not required.

APPEARANCES: Timothy V. Coffey, Esq., El Paso, Texas, for appellant; Scott R. Rosen, respondent, pro se.

OPINION BY ADMINISTRATIVE JUDGE GRANT

Tommy L. Alford appeals the Wyoming State Office (WYSO), Bureau of Land Management (BLM), decision of June 15, 1982, which dismissed his protest, filed April 16, 1982, against the first-drawn application W 78293 of Scott R. Rosen for parcel WY 7492 in the November 1981 notice of lands available for

oil and gas filings. In this protest, Alford suggested that the application of Rosen had been prepared by a lease filing service and there was a possibility that the proper procedures were not followed.

The application of Rosen was prepared by Federal Lease Filing Corp. (FLFC), agent for Rosen, and the application was signed as follows: "D. Riordan [in script], ASST. SEC. FEDERAL LEASE FILING CORP., AGENT FOR SCOTT R. ROSEN." Significantly, the application referred to CA-3000 as the serial number where the agent's qualifications had previously been filed. When WYSO adjudicated Rosen's application, it checked with the California State Office (CASO), BLM, and ascertained that D. Riordan (identified as Debbie Riordan) had not been identified by FLFC as authorized to sign simultaneous oil and gas applications until December 24, 1981. Since the application of Rosen had been executed November 3, 1981, WYSO initially deemed Rosen's application unacceptable, and by decision of May 12, 1982, WYSO rejected it.

Subsequently, WYSO received advice from an employee in the Washington Office of BLM that an instrument appointing a representative of a filing service as an "agent" of the said filing service is considered an "in house" procedure, rather than a requirement that would have to be filed as "an amendment to a statement of qualifications," pursuant to 43 CFR 3102.2-1(c) (1981). Thereafter, WYSO, by letter of June 15, 1982, vacated its May 12, 1982, decision, and transmitted lease forms and stipulations, together with a request for the first year's rental, to Rosen; at the same time, WYSO issued the decision dismissing the protest of Alford which is the subject of this appeal. 1/ The advice given informally to the WYSO was later incorporated in Instruction Memorandum 82-534, dated June 23, 1982, which was signed by the Associate Director, BLM, and disseminated to all BLM state directors.

Appellant contends in his statement of reasons for appeal that FLFC did not comply with 43 CFR 3102.2-1(c), which provides (1) that amendments to statements of qualifications of agents must be filed promptly with BLM, and (2) that the serial number where the qualifications are of record may not be used if the statement on file is not current. On November 3, 1981, when Debbie Riordan signed the application of Rosen, there was no authority for her signature on file in any BLM office. A belated attempt to show that Ms. Riordan was authorized to act for FLFC was executed by FLFC on November 17, 1981, and filed with CASO December 24, 1981. Appellant contends that the application of Rosen should be rejected, saying:

1/ Rosen has filed a motion for summary dismissal, alleging that appellant failed to serve him with a copy of the notice of appeal within 15 days after it was filed with BLM, as required by 43 CFR 4.413. The notice of appeal was filed with BLM on June 30, 1982, so that appellant was required to "serve" respondent, who was named as an adverse party in the decision appealed from, on or before July 15, 1982. Although Rosen did not receive the document until July 16, 1982, dismissal for failure to timely serve an adverse party is discretionary under 43 CFR 4.402 and it would be an abuse of discretion to dismiss on this ground in the absence of prejudice which has not been shown here.

> The number one drawee's simultaneous oil and gas lease application was executed by a representative of the Federal Lease Filing Corporation. The Corporation had used reference number CA-3000. The Wyoming State Office checked with the California State Office and discovered that the person signing the application was not, at the time, an authorized signatory for the corporation. 43 C.F.R. § 3102.2-1(c) provides in pertinent part:
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> > A statement of the qualifications of an . . . agent . . . may be placed on file with a Bureau of Land Management Office . . . The office receiving the statement shall indicate its acceptance of the qualifications by assigning a serial number to the statement. Reference to this serial number may be made to any Bureau of Land Management Office in lieu of resubmitting the statement. Such a reference shall constitute certification that the statement complies with paragraph "b" of this section. Amendments to a statement of qualifications shall be filed promptly and the serial number shall not be used if the statement on file is not correct. [Emphasis added by appellant.]

(Statement of Reasons at 4-5).

The record discloses that on or about December 21, 1981, the Corporation transmitted to the CASO copies of "Appointment to Assistant Secretary Forms" empowering certain individuals to execute Form 3112-1. Among these documents, was an appointment of Debbie Riordan dated November 17, 1981. Ms. Riordan signed the application of the number one drawee as agent on November 3, 1981. The appointment contained certain ambiguities in that it states that it is effective November 1, 1981, while further stating that "the period of your appointment is from the date of this letter through November 23, 1981." Despite the ambiguity, it is clear from the acknowledgement by a Notary Public, that in fact the instrument evidencing the authorization was executed November 17, 1981.

Prior to the issuance of BLM Instruction Memorandum 82-534, it was the understanding of the several BLM state offices that compliance with 43 CFR 3102.2-1(c) required each of the oil and gas lease filing services to supply BLM with a list of those officers and/or other persons who were empowered to act in its behalf by executing the lease applications filed for its clientele. They could do this on a case-by-case basis, or by maintaining a file in one BLM office and referring to the serial number of that file on each individual application. Apparently, FLFC attempted compliance by maintaining such a file in the CASO under serial number CA-3000, and by referring to that number on applications which it filed.

Appellant vigorously argues that the retroactive application of the instruction memorandum was improper, saying:

II.

The Bureau of Land Management should not have retroactively applied its Instruction Memorandum No. 82-[534] which effectively represented a policy statement and thus should have been applied prospectively only.

III.

The Instruction Memorandum No. 82-[534] should not in any event have been applied in this case because the number one drawee, Scott R. Rosen, failed to follow the regulatory procedure for appeal when his application was rejected.

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The advance copy of Instruction Memorandum No. 82-[534] represents a change in policy and states: "Where applications are rejected for the reasons stated above, and the appeal period is running, the rejection should be vacated and the applications readjudicated." This obvious effort to change a general policy at the behest of a single, nonappealing agency was arbitrary and should not be applied in the instant case. Mr. Alford does not have a copy of the final version of the Instruction Memorandum and thus cannot ascertain whether the appeal period was running at the time the Instruction Memorandum became official. The entire factual setting leading up to the issuance of the Instruction Memorandum indicates arbitrary and capricious conduct on the part of the Bureau. [Emphasis by appellant.]

(Statement of Reasons at 1-2, 3).

[1] Since the timely filing of a notice of appeal is jurisdictional, we will deal with this argument raised by appellant first. The relevant regulation provides that a decision will not be effective during the time in which a person adversely affected may file a notice of appeal and while any appeal which is timely filed is pending. 43 CFR 4.21(a). A notice of appeal must be filed within 30 days of receipt of the decision being appealed. 43 CFR 4.411(a). The initial decision (later vacated) rejecting Rosen's application was received by him on May 17, 1982. The case file discloses that FLFC sent a letter dated May 20, 1982, to the Director, BLM, a copy of which was sent to the WYSO where it was received May 24, 1982. This letter challenged the basis for rejecting Rosen's application and requested reconsideration and revocation of the decision. No provision of the regulations deprives BLM of the authority to alter a decision which has not become final pursuant to a petition for reconsideration filed within the appeal period, subject to the right of appeal by any party adversely affected by the amended decision. See Ilean Landis, 49 IBLA 59, 62-63 (1980). In any event, the decision was revised on June 15, 1982, prior to the running of the appeal period from the initial (vacated) decision. Thus, there was no improper

retroactive application of the instruction memorandum since the appeal period was still running and a petition for reconsideration had been filed. 2/

[2] The dispositive issue raised by this appeal is what information is required to be filed with BLM to establish the qualifications of an applicant to hold an oil and gas lease where the applicant is represented or assisted by a filing service agent. The regulation at 43 CFR 3102.2-6 (1981) 3/ sets forth the qualifications information required to be filed as follows:

> § 3102.2-6 Agents.
>
> (a) Any applicant receiving the assistance of any other person or entity which is in the business of providing assistance to participants in a Federal oil and gas leasing program shall submit with the lease offer, or the lease application if leasing is in accordance with Subpart 3112 of this title, a personally signed statement as to any understanding, or a personally signed copy of any written agreement or contract under which any service related to Federal oil and gas leasing or leases is authorized to be performed on behalf of such applicant. Such agreement or understanding might include, but is not limited to: A power of attorney; a service agreement setting forth duties and obligations; or a brokerage agreement.
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> (b) Where a uniform agreement is entered into between several offerors or applicants and an agent, a single copy of the agreement and the statement of understanding may be filed with the proper office in lieu of the showing required in paragraph (a) of this section. A list setting forth the name and address of each such offeror or applicant participating under the

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2/ It should be noted that while instruction and/or information memoranda originating in the Office of the Director, BLM, for dissemination to BLM field officials, may express the policies or legal interpretations of BLM and bind BLM personnel to follow them (Margaret A. Ruggierio, 34 IBLA 171 (1978)), such memoranda are not "rules" promulgated pursuant to the Administrative Procedure Act, and do not have the force or effect of law. Cf. Arizona Public Service Co., 20 IBLA 120 (1975) (BLM memorandum contrary to regulation not effective pending rulemaking with notice and publi- cation). Such memoranda are not binding on this Board or on the general public. Sierra Club, 61 IBLA 329, 334 (1982), and cases therein cited.

3/ On Feb. 26, 1982, the Department published interim final regulations revising 43 CFR 3102 and effectively eliminating the requirement to file the statement of qualifications previously required by 43 CFR 3102.2-6. 47 FR 8544 (Feb. 26, 1982). While in certain circumstances the Board may apply revised regulations to a pending matter where it benefits the affected party (see James E. Strong, 45 IBLA 386 (1980)), it is not possible to do so in this case because of the intervening rights of appellant, the second priority applicant, coupled with the obligation to issue a noncompetitive lease only to the first-qualified applicant. 30 U.S.C. § 226(c) (1976); see Ballard E. Spencer Trust, Inc., 18 IBLA 25 (1974), aff'd, Ballard E. Spencer Trust, Inc. v. Morton, 544 F.2d 1067 (10th Cir. 1976).

> agreement shall be filed with the proper Bureau of Land Management office not later than 15 days from each filing of offers, or applications if leasing is in accordance with Subpart 3112 of this title.

Thus, to establish compliance an applicant must provide under 43 CFR 3102.2-6(a) a personally signed copy of any written agreement or personally signed statement of any understanding under which any service related to Federal oil and gas leasing is authorized to be performed. In the alternative, where a uniform agreement is entered into between several applicants or offerors and an agent, the qualifications of the applicant may be established under 43 CFR 3102.2-6(b) by the filing of a copy of the agreement and a list setting forth the name and address of each applicant or offeror participating thereunder. Alvyn G. Novotny, 55 IBLA 196 (1981).

In lieu of filing the documents required by either 43 CFR 3102.2-6(a) or (b) with each simultaneous filing in each BLM office, the regulation at 43 CFR 3102.2-1(c) provides a method of filing the documents required by either subsection for reference in one BLM office. Subsequent to approval thereof and assignment of a serial number by that office, reference to the documents filed is allowed by reference to the assigned serial number. Alvyn G. Novotny, supra. There is no issue in this case that a copy of the standard agreement between applicant Rosen and FLFC and a list of names and addresses of applicants (including Rosen) participating thereunder was timely provided and referenced by assigned serial number on Rosen's application.

Although 43 CFR 3102.2-1(c) provides that amendments to the required information shall be filed promptly and that the serial number reference shall not be used if the information is not current, this regulation does not establish what evidence of qualifications is required. The regulations at 43 CFR 3102.2-6(a) and (b) simply do not require that corporate agents (as distinguished from corporate offerors or applicants) provide documents authorizing their employees to sign applications on behalf of the agent. 4/ A regulation should be sufficiently clear that there is no reasonable basis for an oil and gas lease applicant's noncompliance with the regulation before it is interpreted to deprive an applicant of a preference right to a lease. Charles J. Rydzewski, 55 IBLA 373, 88 I.D. 625 (1981); A. M. Shaffer, 73 I.D. 293 (1966).

This case is properly distinguished from those holding that an application filed on behalf of an applicant that is executed by a filing service agent which is itself a corporation must be signed by an employee or other agent of the corporate agent. E.g., Charles Goodrich, 60 IBLA 25 (1981), aff'd, Goodrich, v. Watt, No. 82-0405 (D.D.C. Aug. 13, 1982). These cases are predicated on the regulation at 43 CFR 3112.2-1(b) requiring that an

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4/ Regardless of the fact that written evidence of the authorization of Debbie Riordan to act as an employee of FLFC in signing applications was not executed until Nov. 17 or received by BLM until Dec. 24, she had apparent authority to sign the application which is sufficient to bind the filing service without a written authorization. Restatement, Second, Agency §§ 27, 30 (1957).

application signed by an agent be holographically signed in a manner to reveal the name of the signatory which regulation has been held to require the holographic signature of the name of the signing employee of the corporate agent. Id.

This Board has previously recognized the distinction between the authority of an employee to sign the application and disclosure of the agreement between the applicant and his agent. In Arthur H. Kuether, 65 IBLA 184 (1982), the Board rejected the argument that a copy of the agreement authorizing the agent to act as required by 43 CFR 3102.2-6 was filed where there was on file a copy of an agreement between applicant and corporate agent A, employee X was listed with BLM as authorized signer for A, and applicant's card was signed by employee X, but the application was filed by corporate agent B for which employee X was also an authorized employee and no copy of applicant's agreement with corporate agent B was filed with BLM. Id. at 187 n.5. This holding preserves that distinction. As the regulation requires disclosure of the agreement between the applicant and his agent and not documentation of the authority of the corporate agent's employee to conduct the employer's business, the application cannot be rejected for failure to provide the latter documentation.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is affirmed.

C. Randall Grant, Jr.
Administrative Judge

We concur:

Will A. Irwin
Administrative Judge

Anne Poindexter Lewis
Administrative Judge

We concur in the result:

James L. Burski
Administrative Judge

Bruce R. Harris
Administrative Judge

ADMINISTRATIVE JUDGE HENRIQUES DISSENTING:

Regardless of whether 43 CFR 3102.2-1(c) requires the submission by a filing service of a list of all persons authorized to act for it, as was supposed by BLM at the time in question, or if it does not, as was subsequently held by the instruction memorandum, the Rosen application was properly rejected by BLM's initial decision. A procedure based upon the then current interpretation of the regulations in the respective BLM state offices was in place and operative, and was understood and accepted by FLFC. In compliance with that procedure, FLFC had opened a qualifications file with BLM, received a reference file number, submitted the names of those who were authorized to sign its clients' lease applications for FLFC, and utilized that file number as a reference on such applications. BLM, therefore, had every right to assume that the reference file contained the names of the only FLFC personnel which it had authorized to act for it, particularly where the FLFC application directed BLM's attention to the file as a means of verification, as the Rosen application did. When the WYSO noted the file number referenced on Rosen's application and contacted the CASO to verify that D. Riordan was among those authorized to act for FLFC, it found that name had not been listed by FLFC, and it correctly disqualified the application.

FLFC knew the nature and content of file CA-3000, and it knew, or should have known, that BLM relied on the information supplied by FLFC and contained in that file in adjudicating the qualifications of applications which it filed for its clients. Indeed, as previously noted, FLFC referred BLM to the information in that file by putting the file number on each of the applications submitted by it, including Rosen's. It is clear that in allowing D. Riordan to sign Rosen's application for FLFC without adding her to the list of authorized persons contained in CA-3000, and then citing file CA-3000 on that application, FLFC was negligent. FLFC was Rosen's agent. The negligence of an agent, acting within the scope of the agency, is imputed to the principal; in this case Rosen. Having created the circumstances which led ineluctably to the rejection of Rosen's application, FLFC and Rosen are clearly estopped from asserting that their error was of no consequence or effect. One who by his conduct has induced another to act in a particular manner should not be permitted to adopt an inconsistent position and thereby cause loss or injury to the other. Moreau v. Oppenheim, 663 F.2d 1300 (5th Cir. 1981). While it may be asserted that BLM was not damaged by its reliance on the representations made by FLFC on behalf of Rosen, that agency is charged with the function of conducting the Federal oil and gas leasing program. Incident to that mission is the obligation to make the statutory determination in each instance as to which of the applications is the first-qualified applicant. 30 U.S.C. § 226(c). Thus, BLM and the general public have a vested interest in the proper accomplishment of that adjudicative function. In this instance, BLM's obligation was to determine whether Rosen or Alford should be treated as the first-qualified applicant and, in making its initial decision, WYSO, in reliance on the representations made to it by Rosen's agent, FLFC, determined that Rosen's application was not acceptable. Where two innocent parties stand to suffer loss caused by the wrongful conduct of a third party (FLFC), the innocent party who has enabled the third party to cause such loss (Rosen) is estopped from raising any defenses; in other words, principles which underlie equitable estoppel place the loss

upon him whose misplaced confidence has made the wrong possible. Alinga v. Perera Co., Inc., 494 F. Supp. 18 (D.N.Y. 1979); Trott v. Dean Witter Co., 438 F. Supp. 842 (D.N.Y.), aff'd, 578 F.2d 1370 (1977); Harrison v. Otto G. Heinzeroth Mortg. Co., 430 F. Supp. 893 (D. Ohio 1977).

On December 24, 1981, long after the filing and the drawing for the subject parcel, FLFC filed an instrument with CASO for inclusion in file CA-3000, which instrument purported to show that Debbie Riordan had been appointed an assistant secretary of FLFC and authorized to sign applications as of November 1, 1981. (The Rosen application was signed by her on November 3, 1981.) However, this document is, at best, ambiguous and of dubious authenticity. Although the text of the instrument reads, in part, "Effective November 1, 1981, you are hereby appointed * * *," the following sentence states, "The period of your appointment is from the date of this letter through November 23, 1981." The letter is dated November 17, 1981, and it was also notarized on November 17, 1981. It would appear, therefore, that the appointment of Debbie Riordan as an authorized signatory of oil and gas lease applications was not made by FLFC until 2 weeks after she executed the Rosen application on behalf of the corporation.

In responding to appellant's statement of reasons for appeal, 1/ Rosen asserts:

> A corporation may ratify the actions of an officer or employee after the fact. The president of FLFC executed the document and thereby ratified the appointment to assistant secretary of Riordan to be effective November 1, 1981. Therefore, Riordan was authorized to act on behalf of the corporation during the time my application was filed.

Setting aside the fact that the letter itself recited two different effective dates for the appointment of Riordan (November 1 and November 17, 1981), I would hold that the corporation's retroactive "ratification" of her action cannot serve to resuscitate Rosen's application. It has long been held by this Board and by the courts that a deficient simultaneously-filed oil and gas lease offer may not be "cured" after the drawing because the intervening rights of the second and third priority applicants are advanced eo instante to the first- and second-priority positions. Ballard E. Spencer Trust, Inc.,

1/ Respondent has filed a motion for summary dismissal, alleging that appellant failed to serve him with a copy of the notice of appeal within 15 days after it was filed with BLM, as required by 43 CFR 4.402(b). The record suggests otherwise. The notice of appeal was filed with BLM on June 30, 1981, so that appellant was required to "serve" respondent, who was named as an adverse party in the decision appealed from, on or before July 14, 1981. "Service" was completed when appellant sent the document to respondent by certified mail, return receipt requested, as described in 43 CFR 4.401(c)(1). Respondent received the document on July 16, 1982. Thus, in view of the expected time for postal handling, it is a virtual certainty that the document was mailed (and service was thus completed) on or before July 14, 1982. Respondent's motion is denied.

18 IBLA 25 (1974), aff'd, Ballard E. Spencer Trust, Inc. v. Morton, 544 F.2d 1067 (10th Cir. 1976).

The post hoc publication of BLM Instruction Memorandum 82-534 cannot control the disposition of this case.

While instruction and/or information memoranda originating in the Office of the Director, BLM, for dissemination to BLM field officials, may express the policies or legal interpretations of BLM and bind BLM personnel to follow them (Margaret A. Ruggierio, 34 IBLA 171 (1978)), such memoranda are not "rules" promulgated pursuant to the Administrative Procedure Act, and do not have the force or effect of law. Cf. Arizona Public Service Co., 20 IBLA 120 (1975). Such memoranda are not binding on this Board or on the general public. Sierra Club, 61 IBLA 329, 334 (1982), and cases therein cited.

Although the new interpretation of what is required, or not required, by 43 CFR 3102.2-1(c), as articulated by BLM Instruction Memorandum 82-534, may reflect a reasonable and legitimate basis for alteration of BLM procedures, it may not serve as a vehicle for retroactive adjudication of applications filed previously in accordance with the procedures then in effect.

I would reverse the WYSO dismissal of the protest of Tommy L. Alford, direct WYSO to reject the application of Scott R. Rosen, and to issue the lease for parcel WY 7492 to Alford.

Douglas E. Henriques
Administrative Judge

We concur:

Edward W. Stuebing
Administrative Judge

Gail M. Frazier
Administrative Judge